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No. 76-106

In the Supreme Court of the United States

OCTOBER TERM, 1976

BURTON A. LIBRACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-8) is reported at 536 F. 2d 1228.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1976, and a petition for rehearing with suggestion of rehearing *en banc* was denied on July 9, 1976. The petition for a writ of certiorari was filed on July 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the prosecutor lacked authority to promise a prospective government witness that he would not be prosecuted in return for his testimony at trial.

2. Whether petitioner would be entitled to relief upon proof of his allegation that the prosecutor violated internal Department of Justice guidelines in obtaining his superior's consent to placing the witness in protective custody.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of filing a false claim and of using a false document to obtain an urban renewal relocation payment from the Department of Housing and Urban Development, in violation of 18 U.S.C. 1001. He was sentenced to six months' imprisonment on the false claim charge, and sentence of imprisonment on the false document charge was suspended in favor of two years' probation. The court of appeals affirmed (Pet. App. A-1 to A-8).

The evidence showed that petitioner fraudulently obtained $9,700 from the St. Louis Land Clearance Redevelopment Authority, a quasi-municipal agency that contracted with the Department of Housing and Urban Development to perform urban renewal work in the St. Louis area. Petitioner, an attorney, intentionally filed a false claim with the Redevelopment Authority in which he asserted that one of his clients had incurred expenses of $12,200 in moving its furnishings into an apartment complex in which he had an equity interest. Petitioner knew, however, that his client actually had sold its furnishings for $1,000.[1]

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[1]The computation of the amount of money fraudulently obtained reflected the fact that, under the urban renewal program, the client was legally entitled to a small business displacement payment of $2,500 (Tr. 66).

The government's chief witness was petitioner's alleged accomplice, Robert Fowler, former chief of relocation for the Authority. Fowler testified that he arranged for payment of the fraudulent claim in return for a $1,000 payment from petitioner (Tr. 62-100, 110-111, 122-123). Fowler's testimony was substantially corroborated by six other witnesses, including the man who purchased the furniture (Tr. 45-49, 52-53, 58-59, 141-143, 149-156, 163-165, 172, 175, 177-180, 184-186, 204, 218-220, 224, 226). In the course of his direct and cross-examination, Fowler admitted that prior to his grand jury appearance the government had promised that, in return for his testimony against petitioner at trial, he would not be prosecuted for his participation in the fraudulent scheme (Tr. 92, 112-116, 125-126, 130-135). Fowler also testified that he was placed in protective custody from June 1974 through January 1975 and that his family moved from Missouri to Illinois because of threats against his life. Fowler received approximately $9,947 from the government during this period for food, housing, clothing and other essentials (Tr. 116-120, 127-130, 135-137).

ARGUMENT

1. Petitioner contends (Pet. 8) that without authorization from the Attorney General or his designee and approval by the district court pursuant to 18 U.S.C. 6001 *et seq.*, the prosecution lacked authority to determine not to prosecute Fowler in return for his testimony. He argues that the testimony resulting from that bargain therefore was illegal and should have been suppressed. However, the court of appeals correctly held (Pet. App. A-2 to A-3) that the prosecutor's failure to seek a formal grant of immunity from the district court under the federal witness immunity statute did not render its deci-

sion not to prosecute Fowler unlawful.[2] It is well established that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case * * *," *United States* v. *Nixon*, 418 U.S. 683, 693; see *Confiscation Cases*, 7 Wall. 454, and petitioner has cited no authority to support the proposition that such discretion must be exercised through a formal, judicial grant of immunity. The facts surrounding Fowler's decision to testify were laid before the jury, and the regularity or sufficiency of the prosecutor's assurances to Fowler are matters that petitioner has no standing to raise.

2. Petitioner also contends (Pet. 15-18) that Fowler was improperly placed in the government's witness protection program on the basis of fictitious threats to his safety.[3] Even if this allegation were true, however, the validity of petitioner's conviction would not be subject to attack. Under questioning before the jury, Fowler conceded that he had received payments under the program and testified as to their amount and the purposes for which they were spent (Tr. 116-118, 127-130, 135-136). Petitioner's counsel utilized this information

[2]Although the prosecution did obtain authority from the Department of Justice to apply to the district court for a formal order of immunity for Fowler, no such application was necessary, because the witness voluntarily agreed to testify (Pet. App. A-2, n. 2).

[3]The court of appeals found that petitioner had not raised this issue before the district court, and it therefore refused to consider it for the first time on appeal (Pet. App. A-5, n. 5). Since this claim was not adequately raised in the court of appeals, the issue is not properly before this Court. *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. In any event, the telegrams upon which petitioner relies (Pet. 6, 16) to establish his claim were made available for his inspection at trial (Tr. 6-7). His failure to present this issue to the district court in a timely fashion thus is the result of his lack of due diligence, which bars the award of a new trial. Fed. R. Crim. P. 33.

to attack the witness's credibility (Pet. App. A-5). Thus, there is no allegation that the government suppressed any material evidence affecting the credibility of this witness and thereby tainted the jury's deliberations. Accordingly, even if the prosecutors had misrepresented the existence of these threats to Department of Justice personnel in Washington or otherwise failed to follow every particular of the Department's internal guidelines for placing a witness in the witness protection program, those actions, although perhaps properly the subject of administrative discipline or a separate criminal prosecution, would not entitle petitioner to a new trial. See *Sullivan* v. *United States*, 348 U.S. 170, 173; *United States* v. *Lockyer*, 448 F. 2d 417 (C.A. 10); cf. *United States* v. *Janis*, 74-958, decided July 6, 1976, slip op. 25-26.

In any event, although the court of appeals did not rely on this rationale,[4] the record refutes petitioner's allegation that the prosecution manufactured these threats on Fowler's life. The uncontradicted evidence at trial showed that Fowler was threatened once in May 1974 and twice on June 19, 1974, the day of his appearance before the grand jury in connection with this prosecution (Tr. 128).

Moreover, the failure of the prosecution to submit a full description of the threats against Fowler's life to the Department of Justice in Washington to accompany its request for authority to place him in protective custody does not entitle petitioner to relief. There is no statutory requirement that a witness's personal safety must have been threatened before he may be placed in the wit-

[4]Because the court of appeals made no factual determination on petitioner's claim, his reliance on *DeMarco* v. *United States*, 415 U.S. 449, is misplaced.

ness protection program. 28 U.S.C. 524; cf. Pub. L. 91-452, Sections 501-504, 84 Stat. 933-934, note preceding 18 U.S.C. 3481. The only requirement that the "degree of threat" be communicated to the responsible Department official in Washington is contained in the Department of Justice's own internal guidelines. The June 19, 1974, threats against Fowler were sufficient to invoke protective custody under those guidelines, as attested by the Department's grant of authorization upon receipt of the warning telegram from the prosecution. Therefore, as the court of appeals held (Pet. App. A-5), these payments to Fowler under the witness protection program were properly authorized.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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